

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 KEEP KEIZER LIVABLE and KEVIN HOHNBAUM,
5 *Petitioners,*
6

7 vs.
8

9 CITY OF KEIZER,
10 *Respondent,*
11

12 and
13

14 E-VILLAGE, LLC,
15 *Intervenor-Respondent.*
16

17 LUBA No. 2011-043
18

19 FINAL OPINION
20 AND ORDER
21

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22 Appeal from City of Keizer.
23

24 Kenneth D. Helm, Beaverton, filed the petition for review and argued on behalf of
25 petitioners.
26

27 E. Shannon Johnson, City Attorney, Keizer, filed a joint response brief and argued on
28 behalf of respondent. With him on the brief were Zachary Dablow and The Ghiorso Law
29 Firm.
30

31 Zachary Dablow, Salem, filed a joint response and argued on behalf of intervenor-
32 respondent. With him on the brief were E. Shannon Johnson and The Ghiorso Law Firm.
33

34 BASSHAM, Board Member; RYAN, Board Chair, participated in the decision.
35

36 HOLSTUN, Board Member, concurring.
37

38 REMANDED

08/19/2011
39

40 You are entitled to judicial review of this Order. Judicial review is governed by the
41 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners challenge a city council decision that approves the Master Plan for Area C of the Keizer Station planned mixed-use development.

MOTION TO INTERVENE

E-Village, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. No party opposes the motion, and it is granted.

FACTS

The challenged decision approves the Master Plan for Area C of Keizer Station—part of a larger planned development. The previously approved Keizer Station Plan established Area C as an approximately 34-acre property to the south of earlier phases of Keizer Station, which are largely developed with commercial retail establishments. Area C is primarily zoned Mixed Use. In a portion of Area C designated as “Anchor 9” intervenor intends to develop a 116,000-square foot “Larger Format Store.” In an adjoining area designated as sub-area C-3 intervenor proposed to construct non-retail and multifamily residential developments. The proposed non-retail and multifamily residential developments are located between the Larger Format Store and existing residential neighborhoods that abut the southwestern boundary of Area C.

Under Keizer Development Code (KDC) 2.107.05(D)(1), “Larger Format Stores” are allowed in the Mixed Use zone as part of a master plan, subject to approval criteria that obligate the applicant to also construct a certain amount of “non-retail/non-single-family” development, depending on the size of the Larger Format Store. Further, KDC 2.107.05(D)(2) allows the size of the Larger Format Store to be increased above 80,000 square feet if the applicant constructs a proportionate amount of “vertical mixed use” development. The decision and parties collectively refer to the “non-retail/non-single family” development and the “vertical mixed use” development as “required mixed use

1 development.” Under the above formulas, the proposed 116,000-square foot Larger Format
2 Store required a minimum of 29,000 square feet of non-retail or multifamily residential
3 development in addition to 36,000 square feet of vertical mixed use development. The
4 application proposed several mixed use or multi-family residential buildings in sub-area C-3
5 to satisfy the requirements of KDC 2.107.05(D)(1) and (2) for the required mixed use
6 development.

7 Apparently to ensure that the required mixed use development is actually constructed,
8 KDC 2.107.05(D)(3) also establishes what the parties call a “concurrency” requirement,
9 providing that:

10 “The development required in Subsection D(1) and D(2) above shall take
11 place in the same Master Plan area. The approved Master Plan shall be
12 conditioned to require such development *to be constructed before or*
13 *concurrently with* the Larger Format Store.” (Emphasis added).

14 To satisfy the concurrency requirement in KDC 2.107.05(D)(3), the planning commission
15 recommended a condition of approval requiring that the building permit for the required
16 mixed use development be issued prior to or simultaneously with the building permit for the
17 Larger Format Store, and similarly that certificates of occupancy for the required mixed use
18 development be issued prior to or simultaneously with the issuance of a certificate of
19 occupancy for the Larger Format Store.

20 The city council held public hearings on February 22 and March 7, 2011. During a
21 city council meeting on April 4, 2011, the council voted to impose Condition 57, which like
22 the planning commission-recommended condition requires that the building permit for the
23 required mixed use development be issued prior to or simultaneously with the building
24 permit for the Larger Format Store. However, unlike the planning commission-
25 recommended condition, Condition 57 allows the Larger Format Store to be constructed and
26 issued a certificate of occupancy before the mixed use development is constructed and issued
27 a certificate of occupancy. Specifically, Condition 57 provides that, prior to issuance of a

1 certificate of occupancy for the Larger Format Store, the applicant must take four actions,
2 including completing the foundation work for the mixed use development and providing a
3 bond or guarantee that the mixed use development will be completed.¹ Once those four
4 actions are taken, the city manager will issue a letter certifying full satisfaction of the
5 concurrency requirement. In its final written decision on April 18, 2011, the city council

¹ Condition 57 provides, in relevant part:

“KCD 2.07.05(D)(3) provides that the Required Mixed Use Developments be constructed before or concurrently with the Larger Format Store. The applicant shall demonstrate compliance with [this] requirement[] as follows:

“a. The applicant shall apply for all necessary building permits for Required Mixed Use Developments prior to or simultaneously with the application for building permits for the Larger Format Store. The Required Mixed Use Developments property must be owned or controlled by the applicant at the time of building permit application.

“b. The applicant shall receive the necessary building permits for the Required Mixed Use Developments prior to or simultaneously with the necessary building permits for the Larger Format Store. The building permits for the Larger Format Store shall not be issued unless the building permits for the Required Mixed Use Developments have been granted.

“c. *The applicant shall complete the following prior to issuance of any certificate of occupancy for the Larger Format Store:*

“1. *Submittal and approval by the City Manager of a certified copy of a formal loan commitments [sic] and/or unpledged, deposited funds available for the Required Mixed Use Developments. The total amount of such loan commitment and/or funds shall equal 100% of the Required Mixed Use Developments’ remaining project costs. * * **

“2. *Applicant shall rough grade the entire Required Mixed Use Developments sites.*

“3. *Applicant shall commence construction and complete at a minimum at least 100% of the foundation work for the Required Mixed Use Developments.*

“4. *Submittal and approval by the City Manager of an appropriate guarantee, completion/performance bond, or other reasonably acceptable form of security to guarantee the completion of the Required Mixed Use Developments.”*

“d. Upon completion and satisfaction of subsections a, b, and c above, the City Manager shall issue a letter certifying satisfaction of this certificate of occupancy condition for the Larger Format Store. This letter from the City Manager shall constitute full satisfaction of the concurrency requirement for the Larger Format Store.” Record 249-51 (Emphasis added).

1 interpreted KDC 2.107.05(D)(3) not to require completion of the required mixed use
2 development in order to issue a certificate of occupancy to the Larger Format Store. This
3 appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners challenge the city council's interpretation of KDC 2.107.05(D)(3), that the
6 concurrency requirement does not require completion of the required mixed use development
7 before the Larger Format Store can obtain a certificate of occupancy. Petitioners also argue
8 that Condition 57 does not ensure that the required mixed use development will ever be
9 completed.

10 As noted, KDC 2.107.05(D)(3) requires that the master plan be conditioned to require
11 that the required mixed use development "be constructed before or concurrently with the
12 Larger Format Store." The city council interpreted KDC 2.107.05(D)(3) to be met in either
13 of two alternative ways, either by "completion of construction of the required mixed use
14 before the Larger Format Store or construction of the required mixed use 'concurrently with'
15 the Larger Format Store." Record 100. The city council then explained:

16 "The Council interprets the 'concurrency' requirement of its code to mean that
17 the Required Mixed Use is either fully constructed [] before an occupancy
18 permit for the Larger Format Store is issued, or the Required Mixed Use
19 Developments is [sic] in the process of being constructed at the same time as
20 the Larger Format Store is being constructed []. The development time tables
21 need not be identical for the Larger Format Store and the Required Mixed Use
22 Developments. The Council concludes that there is substantial evidence in the
23 record that the Larger Format Store and Required Mixed Use could be
24 constructed concurrently, and the Larger Format Store could be finished first
25 or vice versa. 'Constructed * * * concurrently' does not require that
26 construction of the Required Mixed Use be completed before the Larger
27 Format Store can obtain a certificate of occupancy." (Quotations and ellipses
28 in original). Record 101.

29 In other words, according to the city council, the concurrency requirement is fully satisfied as
30 long as *some* construction of the required mixed use development occurs at the same time
31 that the Larger Format Store is in the process of being constructed.

1 Petitioners argue that the city council’s interpretation of KDC 2.107.05(D)(3) is
2 inconsistent with the express language of KDC 2.107.05(D)(3), and cannot be affirmed under
3 ORS 197.829(1)(a).²

4 Whether the city’s interpretation of KDC 2.107.05(D)(3) is inconsistent with the
5 “express language” of a local provision, within the meaning of ORS 197.829(1)(a), “depends
6 on whether the interpretation is plausible, given the interpretive principles that ordinarily
7 apply to the construction of ordinances under the rules of *PGE* [*v. Bureau of Labor and*
8 *Industries*, 317 Or 606, 859 P2d 1143 (1993)].” *Foland v. Jackson County*, 215 Or App 157,
9 164, 168 P3d 1238, *rev den* 343 Or 690, 174 P3d 1016 (2007); *see also Siporen v. City of*
10 *Medford*, 349 Or 247, 243 P3d 776 (2010). Under *PGE*, a court first analyzes the statutory
11 text and context, using the “plain, natural, and ordinary” meaning of undefined language used
12 in the statute, along with applicable rules of construction that directly bear on the
13 interpretation of text. If the intended meaning remains unclear after a text and context
14 analysis, the court can proceed to consider legislative history, if any, and finally if the
15 meaning is still unclear apply general maxims of statutory construction that do not bear
16 directly to the reading of the text. The *PGE* analysis was developed to guide a court’s *ab*
17 *initio* interpretation of a statute, and was presumably not intended to be used to refine the
18 standards under which a court or appellate body *reviews* an interpretation of another body
19 under an explicit standard of review such as ORS 197.829(1). Nonetheless, *Foland* and

² ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “a. Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “b. Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “c. Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 *Siporen* instruct us to apply the *PGE* framework in determining whether a local government’s
2 interpretation of a local code provision is “inconsistent” with the express language of that
3 code provision. Under *Foland* and *Siporen*, after conducting a first level PGE analysis of text
4 and context, we must affirm the local government’s local code interpretation under ORS
5 197.829(1)(a) if that interpretation is “plausible.” *Siporen*, 349 Or at 266.

6 The text at issue requires that “[t]he approved Master Plan shall be conditioned to
7 require such development to be constructed before or concurrently with the Larger Format
8 Store.” KDC 2.107.05(D)(3). Grammatically speaking, “to be constructed” is the core of an
9 infinitive verb phrase in the passive voice.³ The object of that transitive verb is “such
10 development,” *i.e.*, the required mixed use development. “Before” and “with” are
11 prepositions, part of a compound prepositional phrase, the shared object of which is “the
12 Larger Format Store.” That compound prepositional phrase as a whole acts as an adverbial
13 phrase modifying the verb “constructed.” “Concurrently” is a single adverb embedded within
14 that compound prepositional phrase, which modifies only the preposition “with.”
15 Structurally and semantically, the compound prepositional phrase as a whole prescribes *when*
16 the required mixed use development must be “constructed,” using as a reference point the
17 construction of the Larger Format Store: the construction of the mixed use development
18 must occur before, or concurrently with, the construction of the Larger Format Store.

19 The city’s code does not define the key terms in KDC 2.107.05(D)(3). Webster’s
20 Third New International Dictionary (Unabridged 1981), 489, defines the transitive verb
21 “construct” in relevant part to mean “to form, make, or create by combining parts or elements
22 : BUILD, FABRICATE.” The most relevant definition of the synonym “build” is to “to form by
23 ordering or uniting materials by gradual means into a composite whole — used esp. with

³ The grammatical relations would be simplified somewhat if the sentence were re-phrased entirely in the active voice, *e.g.*, “The city shall condition the approved Master Plan to require the applicant to construct such development before or concurrently with the Larger Format Store.”

1 reference to comparatively large or massive structures[.]” *Id.* at 291. The entry for “build”
2 explains that the synonyms “build” and “construct” have “in common the sense of to form a
3 structure or something comparable to a structure.” *Id.* at 292. The most relevant meaning of
4 the preposition “before” is “preceding” in time. *Id.* at 197. The common preposition “with”
5 has many definitions, but the most relevant seem to be “9 * * * b : at the moment or time of *
6 * * d : at the same time as : at the time a specified action or event is performed * * *.” *Id.* at
7 2626. Webster’s defines the adverb “concurrently” to mean “in a concurrent manner.” *Id.* at
8 472. In turn, the most relevant definition of “concurrent” is “occurring, arising, or operating
9 at the same time[.]” *Id.*

10 As noted above, the city deconstructed the phrase “constructed before or concurrently
11 with the Larger Format Store” into two separate, alternative requirements. The city first
12 interpreted the text fragment “constructed before * * * the Larger Format Store” to mean that
13 construction of the required mixed use development must be “complet[ed]” before the Larger
14 Format Store. Record 362. That interpretation seems straightforward and indisputable.

15 The city council then interpreted the text fragment “constructed * * * concurrently
16 with the Larger Format Store” to mean that the concurrency requirement is fully satisfied if
17 some temporal overlap occurs between the construction schedules of the mixed use
18 development and the Larger Format Store, even if the Larger Format Store is completed long
19 before the mixed use development. On appeal, we understand the city and intervenor to
20 argue that under the city’s interpretation of “constructed * * * concurrently with” the mixed
21 use development need not ever be completed. Viewed in isolation, that interpretation of the
22 text fragment “constructed * * * concurrently with the Larger Format Store” is textually
23 plausible, but considering the grammatical structure in which that text occurs, and the
24 relevant definitions cited above, we agree with petitioners that the city’s interpretation is
25 inconsistent with the express language of KDC 2.107.05(D)(3) as a whole.

1 As noted, the compound preposition phrase “before or concurrently with the Larger
2 Format Store” modifies the verb “constructed,” prescribing when the mixed use development
3 must be constructed vis-à-vis the construction of the Larger Format Store. The city council
4 initially interpreted “constructed” when combined with the preposition “before” to mean that
5 the mixed use development must be “complet[ed]” before the Larger Format Store is
6 completed. Record 100. That is consistent with the definition of “construct” and its
7 synonyms, which indicate that a structure is “constructed” when its materials are united into a
8 “composite whole.” The mere commencement of construction does not make a “whole” of
9 any kind. Inexplicably, the city council then interpreted the verb “constructed” to mean
10 something different when combined with the preposition plus adverb of “concurrently with.”
11 The city council interpreted “constructed” when combined with “concurrently with” to mean
12 essentially “undergoing the process of construction” at the same time. However, as noted
13 above, both prepositions “before” and “with” are part of a compound phrase prescribing
14 *when* the mixed use development must be “constructed” in relation to the construction of the
15 Larger Format Store. As those terms are defined, “before” simply adds the sense of
16 “preceding,” while “concurrently” and “with” add only the sense of “at the same time.”
17 Neither preposition alters the basic meaning of the verb “constructed.” Put another way, the
18 city interprets the same verb “constructed,” as used in the same sentence, to have multiple,
19 conflicting meanings. That is simply not consistent with the express language of KDC
20 2.107.05(D)(3).

21 In sum, the only plausible interpretation of the whole text of KDC 2.107.05(D)(3),
22 with its key words given their plain and ordinary meaning, is that the required mixed use
23 development must be “constructed” (made into a composite whole) before or at the same
24 time the Larger Format Store is constructed (made into a composite whole). The city may
25 have some latitude to prescribe what construction of both developments “concurrently” or “at
26 the same time” means as a practical matter. For example, the city could presumably deem

1 KDC 2.107.05(D)(3) satisfied if the certificate of occupancy for the Larger Format Store is
2 issued contemporaneously with, or no earlier than, the certificate of occupancy for the mixed
3 use development, as the planning commission recommended. Presumably there are other
4 approaches that would adequately assure that the mixed use development is constructed
5 before or reasonably contemporaneously with the construction of the Larger Format Store.
6 But the city's interpretation would allow the required mixed use development to remain at
7 best partially constructed for an indefinite period after the Larger Format Store is completed.
8 It is impossible to square that interpretation with the plain meaning of the express language
9 "constructed before or concurrently with."

10 The city did not expressly consider any context for KDC 2.107.05(D)(3), but the
11 city's interpretation is also at odds with its immediate context. Under KDC 2.107.05(D)(1), a
12 Larger Format Store may lawfully exist only upon the "development" of non-retail uses.
13 Under KDC 2.107.05(D)(2), a Larger Format Store may be increased in size above 80,000
14 square feet only upon a corresponding increase in vertical mixed use "development." The
15 concurrency requirement in KDC 2.107.05(D)(3) functions as the means to ensure that the
16 quid-pro-quo required under KDC 2.107.05(D)(1) and the bonus obtained under KDC
17 2.107.05 (D)(2) are complied with and earned.⁴ In other words, the scenario that KDC
18 2.107.05(D)(3) is clearly intended to prevent is having a constructed Larger Format Store in
19 place without the mixed use development that is essential justification for the Larger Format
20 Store. That scenario is not possible if the city gives effect to the plain meaning of the words
21 in KDC 2.107.05(D)(3), and imposes conditions like those recommended by the planning
22 commission. Yet that scenario is entirely possible under the city's interpretation of KDC
23 2.107.05(D)(3) and the Condition 57 it imposed. The city determined that the concurrency

⁴ Petitioners also argue that the city relied on the required mixed use development to buffer the impacts of the Larger Format Store from the nearby residential neighborhood, for purposes of criteria requiring that development be "compatible * * * with existing residential development." Record 79.

1 requirement is fully satisfied once the city manager issues a letter finding that the conditions
2 in Condition 57(c)(1) to (4) are met. Those conditions include several financial incentives
3 for the applicant to some day complete the construction of the required mixed use
4 development, but do not in fact require or ensure actual completion at any time, or provide
5 any mechanism for the city to enforce Conditions 57(c)(1) to (4) to require completion.
6 Notably, there are no time restrictions at all in Conditions 57(c)(1) to (4), and nothing that
7 could possibly be enforced after the city manager issues the letter. The applicant can delay
8 completion for as long as the applicant wishes or is willing to accept the financial
9 consequences, and need not ever construct the mixed use development. Indeed, it is difficult
10 to imagine what set of conditions operable *after* the Larger Format Store is completed and
11 issued an certificate of occupancy that could ensure that the required mixed use development
12 would in fact be completed.

13 As explained, the apparent purpose of the concurrency requirement at KDC
14 2.107.05(D)(3), read in context with KDC 2.107.05(D)(1) and (2), is to prevent a
15 circumstance where a constructed Larger Format Store is in place without the required mixed
16 use development. Although petitioners do not cite it, ORS 197.829(1)(b) provides that
17 LUBA must affirm a local government's plan or code interpretation unless it is "inconsistent
18 with the purpose for the comprehensive plan or land use regulation[.]" ORS 197.829(1)(b)
19 codifies language in *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992), stating
20 that LUBA must defer to a governing body's interpretation of local legislation unless that
21 interpretation is inconsistent with the "apparent purpose" of the legislation. The ORS
22 197.829(1)(b) "purpose" prong is independent of the ORS 197.829(1)(a) "express language"
23 prong. Therefore, even if we concluded that the city's interpretation of isolated text in KDC
24 2.107.05(D)(3) were "plausible," or consistent with its text and context, LUBA could not
25 affirm that interpretation if it is inconsistent with the purpose of KDC 2.107.05(D)(3). Here,
26 the city's interpretation would allow the very outcome that KDC 2.107.05(D)(3) is plainly

1 intended to prevent, and therefore the city's interpretation is inconsistent with the purpose of
2 KDC 2.107.05(D)(3).

3 The first assignment of error is sustained in part.⁵

4 **SECOND ASSIGNMENT OF ERROR**

5 KDC 2.301(B) adopts the latest edition of the International Traffic Engineer's Trip
6 Generation Manual (the Manual) as the "standards by which to gauge average daily trips."
7 Intervenor's traffic engineer used the Manual to calculate the traffic generated by the
8 proposed 116,000 square foot Larger Format Store. The engineer used the category Free
9 Standing Discount Superstore in the Manual to estimate traffic generation. Apparently, the
10 Free Standing Discount Superstore category assumes a certain square footage or range of
11 square footage, and the lowest square footage assumed for that category is about seven
12 percent higher (123,000 square feet) than the 116,000-square foot building proposed. To
13 compensate for that fact, intervenor's traffic engineer interpolated values for the lower square
14 footage and produced traffic generation figures based on that interpolated value.

15 Petitioners argue that the city committed legal error in accepting trip generation rates
16 based on that interpolation. According to petitioners, the Manual provides that if the actual
17 size of the proposed development is outside the "range of data" for the appropriate use
18 category, then the traffic impact analysis must "collect local data and establish a local rate."
19 Petition for Review 15.⁶ Petitioners' traffic expert argued below, based on this language in

⁵ In a sub-assignment of error, petitioners also challenge the decision because it does not provide a mechanism for challenging the City Manager's decisions regarding satisfaction of aspects of Condition 57. Because we determine that the plain language of KDC 2.107.05(D)(3) requires completion of the required mixed use development prior to or at the same time as completion of the Larger Format Store, we do not reach this sub-assignment of error.

⁶ Petitioners state that relevant portions of the Manual are included in an appendix to the petition for review, but no portions of the Manual are attached. The Manual is not in the record, but if the city has adopted the Manual pursuant to KDC 2.301(B) it is presumably subject to official notice. No party argues otherwise, or disputes to the accuracy of the quoted portions in the petition for review, and we therefore assume those quotations are accurate.

1 the Manual, that interpolation is an impermissible approach and that, pursuant to the Manual,
2 trip estimates for the Larger Format Store outside the relevant “range of data” must be based
3 on the collection of “local data.” Record 994. Intervenor’s traffic engineer responded that, in
4 his judgment, it was “appropriate to interpolate,” especially given the seven percent
5 difference between the lowest size in the data range and the size of the proposed store.
6 Record 706-07.

7 In its findings, the city council echoed that testimony, finding briefly that “[a]lthough
8 the size of the Larger Format Store falls outside of the ITE data range [for the category of
9 Freestanding Discount Superstore], it is appropriate to interpolate for values especially since
10 the proposed square footage is within 7 percent of the lowest data point and there is no ‘local’
11 data or ability to obtain representative local data.” Record 154. Petitioners argue that the
12 finding that it is “appropriate” to interpolate fails to explain why the requirement in the
13 Manual for the collection of “local data” in the present circumstance can be ignored. With
14 respect to the finding that there is no local data and no ability to obtain representative local
15 data, petitioners argue that there are multiple existing Larger Format Stores in the area from
16 which representative traffic counts can be obtained.

17 In the joint response brief, respondents do not dispute that the Manual requires the use
18 of “local data” in the present circumstance, but argue that the city has discretion under KDC
19 2.301.04(D)(3) to waive or modify any required elements of the traffic impact analysis. KDC
20 2.301.04(D)(3) states:

21 “Pre-application Conference. The applicant will meet with Keizer Public
22 Works prior to submitting an application that requires a Traffic Impact
23 Analysis. *The City has the discretion to determine the required elements of the*
24 *TIA and the level of analysis expected.*” (Emphasis added).

25 Respondents argue that the city council interpreted KDC 2.301.04(D)(3) to grant it the
26 discretion to waive the requirement imposed by the Manual to use “local data,” and to the

1 extent there is a conflict between the code and the Manual, the city's choice is entitled to
2 deference under *Siporen* and ORS 197.829(1).

3 The city's findings do not mention KDC 2.301.04(D)(3), as far as we are informed,
4 and it is not clear to us that the finding that it is "appropriate" to use interpolated values
5 rather than local data is based on any code interpretation at all, express or implied. To the
6 extent there is some implied interpretation of the Manual or a code provision on this point, it
7 is not adequate for review. ORS 197.829(2).

8 We agree with petitioners that the city's findings on this point are inadequate to
9 explain why the requirement to use "local data" in this circumstance can be avoided. The
10 city may consider on remand whether KDC 2.301.04(D)(3) allowed the city to waive or vary
11 that requirement as part of the pre-application process. We also agree with petitioners that
12 the finding that no representative local data can be obtained is not supported by the record.
13 Area C is part of a large existing commercial development, and no party disputes that there
14 are one or more Larger Format Stores nearby from which local trip data can be gathered.

15 The second assignment of error is sustained.

16 The city's decision is remanded.

17 Holstun, Board Member, concurring.

18 I disagree with intervenor's and the city's position in their joint response brief
19 regarding what is required to comply with KDC 2.107.05(D)(3). But I write separately to
20 address two aspects of the majority's resolution of the first assignment of error.

21 KDC 2.107.05(D)(3) provides as follows:

22 "The development required in Subsection D(1) and D(2) above shall take
23 place in the same Master Plan area. The approved Master Plan shall be
24 conditioned to require such development *to be constructed before or*
25 *concurrently with* the Larger Format Store." (Emphasis added).

26 As the majority explains, the development required by Subsection D(1) and D(2) is
27 the mixed use development. I agree with the majority that to comply with the KDC

1 2.107.05(D)(3) requirement that the mixed use development “be constructed * * *
2 concurrently with the Larger Format Store,” construction of the mixed use development must
3 be *completed* concurrently with the completion of construction of the Larger Format Store.
4 KDC 2.107.05(D)(3) is not satisfied by simply making sure that the mixed use development
5 and Larger Format Store are both under construction at the same time. In their joint brief,
6 intervenor and the city appear to argue that some overlap in the construction process is all
7 that is required and that KDC 2.107.05(D)(3) does not require that construction of the mixed
8 use development ever be completed:

9 “Keizer’s use of additional guarantees of project completion, and securing
10 financing for required mixed use development as part of satisfying KDC
11 2.107.05(D)(3) are additional protections that Keizer may include, but are not
12 required to be included to satisfy the concurrency requirement, as plausibly
13 interpreted.

14 “* * * *

15 “[A]s interpreted, there is no completion guarant[ee] in KDC 2.107.05(D)(3).”
16 Joint Response Brief 16.

17 I agree with the majority that the above reading of KDC 2.107.05(D)(3) not tenable, although
18 it is not entirely clear to me that the city council actually adopted that interpretation in its
19 decision. But since the city argues in its brief that it adopted that interpretation, I agree with
20 the majority’s rejection of that interpretation of KDC 2.107.05(D)(3). I completely agree that
21 KDC 2.107.05(D)(3) requires that construction of the mixed use development must be
22 completed before or concurrently with the completion of construction of the Larger Format
23 Store.

24 Where I may part company with the majority is the majority’s statement that the
25 words “concurrently with” must be interpreted to mean that the Larger Format Store and
26 mixed use development must be completed “at the same time as the Larger Format Store is
27 constructed (made into a composite whole).” The majority opinion includes language that

1 seems to take a less rigid position regarding the level of deference the city council might be
2 entitled to in interpreting KDC 2.107.05(D)(3):

3 “The city may have some latitude to prescribe what construction of both
4 developments ‘concurrently’ or ‘at the same time’ means as a practical matter.
5 For example, the city could presumably deem KDC 2.107.05(D)(3) satisfied if
6 the certificate of occupancy for the Larger Format Store is issued
7 contemporaneously with, or no earlier than, the certificate of occupancy for
8 the mixed use development, as the planning commission recommended.
9 Presumably there are other approaches that would adequately assure that the
10 mixed use development is constructed before or reasonably
11 contemporaneously with the construction of the Larger Format Store. But the
12 city’s interpretation would allow the required mixed use development to
13 remain at best partially constructed for an indefinite period after the Larger
14 Format Store is completed. It is impossible to square that interpretation with
15 the plain meaning of the express language ‘constructed before or concurrently
16 with.’”

17 Based on the above-quoted language, it is clear that the majority is not saying KDC
18 2.107.05(D)(3) must be interpreted to require that the last nails that complete the Larger
19 Format Store and the mixed use development must be driven at precisely the same instant or
20 that the *only* way the city can ensure concurrent completion of construction of the Larger
21 Format Store and mixed use development is to withhold the occupancy permit for the Larger
22 Format Store until construction of the mixed use development is complete.

23 I believe it would be entirely appropriate for the city to recognize that the KDC
24 2.107.05(D)(3) requirement that the mixed use development “be constructed * * *
25 concurrently with the Larger Format Store” is being applied to complicated construction
26 projects and that some uncertainty about and lack of effective control over the actual end
27 dates for those construction projects is unavoidable. Given that reality, I do not believe that
28 the city is required to read and apply the dictionary definition of “concurrently” so narrowly
29 that it would require that construction of the mixed use development must be completed on
30 the same day, same week, or even the same month as the completion date of the Larger
31 Format Store. I am not sure what the outer limits of *concurrently* completing construction
32 might be, but in the context in which KDC 2.107.05(D)(3) is being applied I do believe the

1 city council has a fair amount of discretion in deciding what concurrency means in this
2 context.

3 I also do not believe the only option the city has if construction of the Larger Format
4 Store is completed before the mixed use development is completed is to require that the
5 Larger Format Store sit empty and unoccupied until the mixed use development is completed.
6 Specifically, I believe the city has the interpretive discretion under *Siporen* to plausibly
7 interpret KDC 2.107.05(D)(3) to allow it to issue an occupancy permit for the Larger Format
8 Store first, so long as the city requires that the applicant provide an adequate and enforceable
9 performance guarantee to ensure that construction of the mixed use development can be
10 completed within some reasonably contemporaneous period of time following issuance of an
11 occupancy permit for the Larger Format Store, in the event the applicant fails to complete
12 that construction within a reasonably contemporary time frame.

13 Finally, I agree with the majority and petitioner that there are some problems with the
14 guarantee required by Condition 57, not the least of which is the failure of Condition 57 to
15 specify a deadline for the applicant to complete construction of the mixed use development if
16 the Larger Format Store is completed first and a permit allowing occupancy of the Larger
17 Format Store is issued first. Without such a deadline, it is not clear when, if ever, the city
18 could exercise the performance guarantee in the event the applicant fails to complete
19 construction of the mixed use development before or concurrently with the Larger Format
20 Store. But since the city takes the position that the guarantee is unnecessary, we need not
21 consider what changes to Condition 57 might be sufficient to make that condition an
22 acceptable means of ensuring that construction of the mixed use development is completed
23 concurrently with completion of the Larger Format Store.